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Supreme Court of the United States

OCTOBER TERM, 1948

No. 675

EMETIA POLIZIO, alias Joe Pledge,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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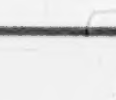

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Supreme Court of the United States

OCTOBER TERM, 1948

EMETIA POLIZIO, alias Joe Pledge,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, which in turn affirmed a judgment of the County Court, Queens County, convicting petitioner, after a jury trial, of the crime of bookmaking, a misdemeaner, under New York Penal Law Sec. 986.

The Opinions Below

No opinion was written either in the Appellate Division (273 App. Div. 1030), or in the Court of Appeals (298 N. Y. 814), but the order on *remittitur* from the latter Court, contains the following statement:

"Upon this appeal the following question was presented and necessarily passed upon, viz.: The appellant contended that the use upon the trial of evidence acquired by illegal search and seizure violated the due process clause of the Fourteenth Amendment of the Constitution of the United States; this Court held that the conviction herein does not deny due process."

Statement on Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on January 6, 1949, and under the law of that state, is a final judgment. The jurisdiction of this Court is invoked under 28 U. S. Code, Sections 1257(3) and 2101(c); and Rule 38½ of this Court.

Summary Statement

Petitioner was indicted and convicted of the misdemeanor of bookmaking by accepting bets on horses, made over a telephone located in his home consisting of a living room and bath, on the third floor of an apartment house (128-9).

On January 28, 1948, petitioner was sentenced to a term of six months, but remained on bail upon certificates of reasonable doubt during the appeals. He began serving said term on February 2, 1949, following said final judgment, and is still serving the same.

As shown by the record, on the afternoon of July 14, 1947, State detectives having obtained permission from a tenant on the floor above petitioner's apartment (109), reached the fire escape outside the window of petitioner's premises. So

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NOTE: Numbers in parentheses refer to folios in the record in the Court of Appeals.

perched, and peering through a venetian blind, officer O'Connor observed petitioner pick up the receiver on the three occasions that the telephone bell rang, and while his lips moved as if talking, saw him apparently writing on a piece of paper, which each time he placed on a pile of other papers of the same size on a desk (115, 120, 126). Defendant's telephone wire had not been tapped (141); the officer could not tell whether "anything was coming over the wire" (152, 263-6); he did not hear anything said by petitioner (142, 152), nor could he see what petitioner was writing, if anything (152, 226, 265).

After the third telephone call, the officer rapped on the window, and exhibiting his shield to petitioner, commanded him "to open up, he was under arrest" (127); and as petitioner "refused" (147), at the same time ripping the telephone wire from its moorings, the detective "broke into the premises" and placed the petitioner under arrest (127). To do so, the officer "kicked" in the window and crawling through it, entered petitioner's living room (128, 167-8). Thereupon the officer physically arrested defendant who was in his underwear, and alone in the apartment (126, 129).

The officer did not tell petitioner what he was being arrested for, either upon ordering him under arrest from outside the window (145, 148, 156, 167), or upon taking him in physical custody (156, 174).

After effecting custody, the officer assisted by others who had followed him through the window and whom he had admitted by opening the hallway door, searched the premises, and upon the desk found 51 slips (188, 253) with the names of horses to run that day and with the names of the player and the amount; and also found three sheets purporting to contain records of previous day's plays, another slip with names and amounts, and a Racing Program. The officer testified that defendant stated that the slips were in

his handwriting; that they represented bets he had taken that day (183); that he had been taking bets for about a week (208); that he took in about $1000 a day in bets; that he had been a bookmaker for twenty years, and "no cop was going to stop him now" (209).

After the physical arrest, and after the search, seizure and examination of the slips (226, 262), the officer now for the first time told defendant that he was being arrested for "bookmaking" (Cf. 174, 225-6, 262).

The officers had no warrant either for petitioner's arrest or for the search of his home, and none had been issued (169-172).

The evidence so obtained by means of said arrest, search and seizure, constitutes the sole basis for the judgment of conviction. There is no other evidence. Petitioner did not testify and produced no witnesses.

Federal Constitutional Question Raised Prior to, During, and After Trial; and Upon Appeals

Prior to the trial, petitioner duly moved before the trial Court, for Orders suppressing the evidence so procured and dismissing the indictment, upon the specific grounds that no misdemeanor had been committed in the officer's presence and to his knowledge, and that therefore the arrest was unlawful and the search and seizure violated Art. 1 Sec. 12 of the State Constitution, and were repugnant to the provisions of the Fourth and Fifth Amendments, and deprived him of liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution (37, 51-2). The motions were denied (27, 33).

Similar motions made thereafter, but also in advance of the trial, in the Supreme Court, in proceedings in the criminal action and in an action for a declaratory judgment, were also denied.

Upon the trial, by timely objections and motions, specifically invoking said State and Federal constitutional provisions, petitioner duly requested the Court to suppress said evidence; to strike it out; to dismiss the indictment; to declare a mistrial; to instruct the jury as requested, and for a directed verdict of acquittal, but all such motions were denied, and exceptions noted. After the trial, and upon the same grounds, timely motions to set the verdict aside, and in arrest of judgment, were also denied, and exceptions noted (80, 132, 174, 347-58, 420, 424-6, 436-51).

Upon the appeals to the Appellate Division and to the Court of Appeals, said State and Federal constitutional provisions were duly and expressly urged by appropriate specifications of error submitted in the "Points".

Statutes Involved

The statutes involved, set forth in the Appendix to this petition, are:

New York Code of Criminal Procedure, Secs. 177, 178 and 986;
New York Constitution, Art. 1 Sec. 12;
New York Civil Rights Law, Sec. 8.

Question Presented

Upon a trial in a State Court, is the use of evidence procured by an unlawful arrest by a State officer, and a resulting unreasonable search and seizure of evidentiary matter, forbidden by the Fourth and Fourteenth Amendments, considered together?

Reasons Relied on for Granting of the Writ

At the time that the officer broke into petitioner's premises by kicking in the window, he had not witnessed the commission of the misdemeaner of bookmaking, nor did he have knowledge that it was in fact being committed, or attempted, if it was, in his presence. The officer obtained the evidence only after he invaded the premises, arrested petitioner, searched for and seized the papers, and questioned petitioner about them.

Consequently, the arrest was unlawful, and the search and seizure unreasonable within the prohibition of the Fourth Amendment; and petitioner's conviction by the use of the evidence so procured, deprived him of liberty without due process of law, contrary to the scope of the protection of the due process of law clause of the Fourteenth Amendment, and in violation of the combined effect of both said amendments, which, as stated, were specially set up and claimed throughout the criminal proceeding in the state courts.

In sustaining the conviction, the New York Court of last resort has rejected the above contention and has thus decided an important question of federal law which has not heretofore been determined by this Court.

The writ should therefore issue, as the question here squarely raised throughout the proceeding, concerns a fundamental right, and is serious, of great importance and far-reaching, particularly because thirty-one States along with New York admit evidence yielded by illegal search and seizure (see *People* v. *Defore*, 242 N. Y. at p. 21); and unless this Court solves the problem, State Courts and officials will draw an implied approval of the growing, widespread practice of obtaining evidence by such lawless means, and of using the same upon trials in State Courts, contrary to said constitutionally protected rights.

BRIEF IN SUPPORT OF PETITION

POINT ONE

The arrest without a warrant was illegal, because no misdemeanor had been committed in the officer's presence to his knowledge. As the search was not an incident to a lawful arrest, it was unreasonable.

1. State law determines the validity of arrest without a warrant (*United States* v. *DiRe*, 332 U. S. 581).

2. Under the statute, Code Crim. Pro. Sec. 177, sub. 1, the officer could arrest for a misdemeanor without a warrant, only if it were "committed or attempted in his presence" and Sec. 178 confers power to break a door or window to effect such an arrest.

These conditions are indispensable to an arrest for a misdemeanor without a warrant (*People* v. *Chiagles*, 237 N. Y. 193; *People* v. *Defore*, 242 N. Y. 13, 18; Cf. *United States* v. *DiRe*, *supra*; *Johnson* v. *United States*, 333 U. S. 10).

Suspicion is not enough (*Stearns* v. *Titus*, 193 N. Y. 272, 275; *People* v. *O'Connor*, 257 N. Y. 473 *People* v. *DeVasto*, 198 App. Div. 620), even though the officer's "conscious knowledge" afforded him grounds for suspicion (*People* v. *Glennon*, 37 Misc. 1, id. 175 N. Y. 45); and even though a misdemeanor was being committed in the officer's very presence, but actually unknown to him as a fact (*Snead* v. *Bonnoil*, 166 N. Y. 325, 328; *People* v. *Marendi*, 213 N. Y. 600, 610; *People* v. *Richter*, 265 App. Div. 767, 771). See also *People* v. *Phillips*, 284 N. Y. 235.

3. The misdemeanor of bookmaking (Penal Law Sec. 986), a *malum prohibitum*, is constituted only by the *concurrence* of multiple essential elements which include specific

acts such as conversation, solicitation, inducing the public to take chances, the quoting of odds, examination of scratch-sheets, the making of a bet, the passing of money, and a recording of the bet (*People* v. *Goldstein*, 295 N. Y. 61; *Peo. ex rel. Litchenstein* v. *Langan*, 196 N. Y. 260, 266; *Peo. ex rel. Jones* v. *Langan*, 132 App. Div. 393; *Peo. ex rel. Shane* v. *Gittens*, 78 Misc. 713, aff'd 155 App. Div. 921; *People* v. *Laude*, 81 Misc. 256; *People* v. *Sabato*, 25 N. Y. S. 2d 315; *People* v. *Kelly*, 45 N. Y. S. 2d 8, the last two cases not in official Misc. reports). The crime is not complete without proof of the existence of such ingredients (*ibid; People* v. *Carpenito*, 292 N. Y. 498).

4. The record makes clear that when the officer arrested petitioner, the first time orally from outside the window (127), and then physically after breaking it and entering (174), he had not heard anything that had been said over the wire by petitioner, or by some outside voice (116, 152); he could not see what petitioner was writing on the slips (152, 226, 265); he did not know that anything that came over the wire was being written (152, 265), and there is no claim that defendant examined the racing program (Cf. 116, 125-7, 150). In the absence of knowledge of any such facts the officer, necessarily, could not tell whether anyone was making, and petitioner was taking, bets on horses. The officer admitted that he merely "concluded" that petitioner "must have been doing" that (151), before he made the arrest.

5. That the officer did not have and could not have had any such knowledge at any time anterior to his examination of the papers searched for and seized, is established by the officer's admissions that in ordering and effecting the arrest, he did not tell petitioner what the arrest was for, either from outside the window (145, 156, 167), or after entering (174, and Cf. self-contradiction, 226, 262). The officer did

not see what was on the slips and papers until "after" the physical arrest (226, 262), and until seizure thereof; and until then, he could not have had actual knowledge that defendant was engaged in taking bets on horses.

Consequently, no crime had been committed or attempted to the officer's actual knowledge, in his presence, so as to authorize him to make the arrest for a misdemeanor, without a warrant, and to break into petitioner's home to do so, after having been refused admittance.

The officer's observations from the fire escape which, admittedly, was "all" he "had" (156) before he forced entry and effected petitioner's custody, would not have supplied enough facts to constitute probable cause for the issuance of a warrant, under the State authorities cited in paragraphs 2 and 3, *ante*.

6. Therefore, the arrest was a trespass, and so, unlawful; and as the search and seizure were thus not an incident to a lawful arrest, they were "unreasonable in the light of common-law traditions" (*People* v. *Defore, supra,* at 18), because they were effected "merely to discover possible grounds for arrest and accusation" (*People* v. *Richter, supra,* at 771; also *People* v. *Chiagles, supra,* at 197; *Harris* v. *United States,* 331 U. S. 145; *Byars* v. *United States,* 273 U. S. 28; *United States* v. *DiRe,* 332 U. S. 58; *Johnson* v. *United States,* 333 U. S. 10) and this rule obtains especially where the offense is *malum prohibitum* (*McDonald* v. *United States,* 335 U. S. 451, 460, per Mr. Justice Jackson).

7. As the invasion and arrest were unwarranted, they constituted "intolerable despotism", a form of "tyranny" (*People* v. *Glennon,* 37 Misc. 1, 7; id. 175 N. Y. 45; *People* v. *Hochstein,* 36 Misc. 562, 567; *Fairmont Athletic Club* v. *Bingham,* 61 Misc. 419; *People* v. *Jakira,* 118 Misc. 303).

Such methods are uniformly held to be reckless exploratory excursions based on mere suspicion, and so, lawless; and the use of their product is anathemized in federal courts (*Weeks* v. *United States,* 232 U. S. 383, and the *Harris, Johnson, DiRe* and *McDonald* cases, cited in paragraph 6.

8. Even though warrants for arrest and search might have been issued on the officer's observations preceding the intrusion, the product of the unlawful search would not justify the unlawful means (*People* v. *Defore, supra,* at 18-19; *Agnello* v. *United States,* 269 U. S. 20; *United States* v. *DiRe* and *Johnson* v. *United States, supra*). As aptly put by Mr. Justice Frankfurter, dissenting, in *Harris* v. *United States, supra,* "An unconstitutional trespass ab initio" may not "retrospectively acquire legality." In the *DiRe* case, the arrest without a warrant was held unjustified under the same Penal Law Sec. 177 here involved, although the search produced forged gasoline coupons; and in the *Johnson* case, under a statute similar to Sec. 177, the arrest for possessing opium was held unlawful because it was effected upon knowledge acquired after unlawful intrusion.

9. Nothing in New York law makes mere possession of bookmaking paraphernalia illegal *per se,* as is the case with policy slips, possession of which, without more, completes the crime (Penal Law Sec. 974; *People* v. *Adams,* 176 N. Y. 351, aff'd 192 U. S. 585). This case, therefore, is unlike the *Adams* case in that respect, and is also distinguishable from cases involving other kinds of contraband, such as a blackjack (*People* v. *Defore,* 242 N. Y. 13) or draft cards (*Harris* v. *United States,* 331 U. S. 145), or counterfeit gasoline ration coupons (*United States* v. *DiRe,* 332 U. S. 581), or opium (*Johnson* v. *United States,* 333 U. S. 10).

POINT TWO

The use upon the State trial of evidence secured by an unlawful arrest, search and seizure by a State officer, denied to petitioner due process of law contrary to the combined effect of the Fourth and Fourteenth Amendments.

1. The rights of privacy and personal security are "fundamental" and "sacred" (*Weeks* v. *United States*, 332 U. S. 383), of the "very essence of constitutional liberty", guaranteed like other fundamental rights (*Gouled* v. *United States*, 255 U. S. 298, 304; *Harris* v. *United States*, 331 U. S. 145). The right is "precious" (*McDonald* v. *United States*, 335 U. S. 451); it is "one of the cardinal rights of free men under our Constitution" (Mr. Justice Murphy, in *Harris* v. *United States* (just above), concurred in by Mr. Justice Frankfurter and Mr. Justice Rutledge); it is "indispensable to individual dignity and self-respect" (*ibid*, per Mr. Justice Jackson, for the Court).

2. In 1903 the New York Court of Appeals held that evidence obtained by unlawful search was admissible (*People* v. *Adams*, 176 N. Y. 351). That Court did not consider the due process clause, and when this Court affirmed (*Adams* v. *New York*, 192 U. S. 585) it did not consider either due process or the self incrimination aspect, because the seizure had been incidental to the execution of a search warrant (as explained in the *Weeks* case at 396).

3. In 1926, the New York Court of Appeals per Cardozo, *J.*, again considered the question in the light of the intervening doctrine of the *Weeks* case and other decisions of this Court that followed, but adhered to its ruling in the

Adams case, although it recognized that this Court had, by the *Weeks* and later cases, in effect overruled its own judgment in the *Adams* case (*People* v. *Defore*, 242 N. Y. 13, 20). It has been said that the *Adams* decision in this Court long ago "fell into disgrace" (*United States* v. *Old Dominion Warehouse Co.*, 10 Fed. 2d 736, 739).

The *Defore* opinion (242 N. Y. at 28), expressly held that the use of evidence produced by unreasonable search was not repugnant to due process under the Fourteenth Amendment. The denial of certiorari (*Defore* v. *New York*, 270 U. S. 657) imports no expression of opinion on the merits (*House* v. *Mayo*, 324 U. S. 42, 46).

4. At the time of the *Defore* decision, the prohibition against unreasonable search was contained in Civil Rights Law Sec. 8, in the same words as the Fourth Amendment.

5. In 1938 the prohibition was added to the New York Constitution as Article 1 Sec. 12 (and was left intact in Civil Rights Law), but in 1943, the Court of Appeals held that the incorporation in the Constitution had effected no change in the State's doctrine of admissibility, in view of the construction that the identical language in Civil Rights Law Sec. 8 had received in the *Defore* case (*People* v. *Richter's Jewelers*, 291 N. Y. 161). The decision in the present case shows adherence to that position.

So far as New York Courts are concerned, then, the constitutional Amendment might as well be stricken (see analogous pertinent remarks in the *Weeks* case at p. 393; and by Mr. Justice Reed in *Upshaw* v. *United States*, 335 U. S. 410, 426).

6. It appears that since the *Defore* case, no application has been made for certiorari in any case involving a similar

question from New York or any other State, except *Wolf* v. *Colorado,* argued on October 19, 1948, not yet decided.

7. We now respectfully submit what appears to be a logical parallel making for exclusion of the product of an illegal search, upon a trial in a state Court.

The New York doctrine expressly admits an extorted confession on the *same* basis as it admits evidence yielded by unlawful search (*People* v. *Malinski,* 292 N. Y. 360, 371-2). The Court there adopted a quotation from the *Defore* case (which involved the product of unlawful search), as "expressing with clarity the applicable and convincing reasoning leading to that conclusion", *i.e.,* the competency of evidence procured by illegal means; and to that the Court added: "We have made our choice" (292 N. Y. at 371-2). The choice was to admit both kinds of illegally procured evidence, upon identical theory.

This Court reversed (*Malinski* v. *New York,* 324 U. S. 401), holding a confession extorted by State officers, incompetent upon a State trial, because of repugnancy to due process of the Fourteenth Amendment.

8. Such had been the doctrine first established by this Court *ten years after* the *Defore* case, in *Brown* v. *Mississippi,* 297 U. S. 278, and uniformly applied in a series of state convictions, the latest of which is *Haley* v. *Ohio,* 332 U. S. 596, to the effect that a conviction based upon a coerced confession lacks the "essential elements of due process," and is a "fundamental" wrong (*Brown* v. *Mississippi, supra,* at 286).

9. As Mr. Justice Black shows in *Adamson* v. *California,* 332 U. S. 46, 67, 68, 86, the ruling in *Brown* v. *Mississippi,* was a substantial departure from the holding of *Twining* v. *New Jersey,* 211 U. S. 78, 111,125-6, which apparently had left states free to compel a confession.

To which are to be added Mr. Justice Black's remarks in *Malinski* v. *New York*, referring to the doctrines of the *Adams* and *Defore* cases as opposed to the *Weeks* and similar cases, to the effect that "the use of evidence obtained by unconstitutional methods, including coercive ones", is not to be tolerated.

10. That coercive means include "unlawful seizures and enforced confessions" on common ground, as "destructive of rights secured by the Constitution", appears from the opinion in the *Weeks* case (232 U. S. at 291-2).

Gouled v. *United States*, 255 U. S. 298, 305, held that the prohibition of the Fourth Amendment runs against the search of "a man's house or office" after entry "by force or by an illegal threat or show of force amounting to coercion".

Wan v. *United States*, 266 U. S. at 16-17, grounded the exclusion of a coerced confession on the doctrine of the *Weeks* and *Gouled* cases, which relate to unreasonable searches.

11. The situation then, comes down to this: New York *admits* evidence procured by unlawful search on the same theory that it admits a coerced confession, while this Court *excludes* both types of evidence, upon identical ground.

The New York Court in the *Malinski* case expressly rejected the argument that the reception of a coerced confession violated due process of the Fourteenth Amendment (amended remittitur, 292 N. Y. 686), while this Court held to the contrary.

It would therefore seem that this Court's ruling in the *Malinski* case establishes that this Court for the *first time* has directly passed upon, and disapproved as inimical to due process, New York's procedural doctrine admitting both kinds of evidence on common basis.

12. The final question is whether the use upon a state trial of evidence obtained by unlawful search by a State officer, falls within the inhibition of the due process clause.

While the clause has never been defined "with precision" (*Bute* v. *Illinois,* 333 U. S. 640), and is not susceptible of "formula" (*Brown* v. *Mississippi, supra*), such specific immunities of the original Bill of Rights as are "implicit in the concept of ordered liberty" are made secure from State interference by the clause (*Palko* v. *Connecticut,* 302 U. S. 319, 326).

Adamson v. *California,* 322 U. S. at 54, holds that besides extorted confessions, the clause "forbids any other type of coercion that falls within the scope of due process".

13. As twice stated by Mr. Justice Frankfurter, the clause has a "pervasive" function, an "independent potency"; that it exacts from the States observance of basic liberties, and that "conduct clearly condemned by due process, but not easily fitting into the pigeonholes of the specific provisions" of the Bill of Rights, and though not falling within their scope, is nevertheless inhibited by the clause (*Malinski* v. *New York,* 324 U. S. at 416; *Adamson* v. *California,* 332 U. S. at 66).

Particularly material here, is Mr. Justice Frankfurter's statement in said two cases, that in determining the "exact question whether the criminal proceeding" in a State Court, resulted in a denial of due process, all the specific immunities must be considered, including "the provision of the *Fourth* Amendment against unreasonable search and seizure" (*ibid*). This is so because its protection is "an indispensable need for a democratic society" (*Harris* v. *United States,* 331 U. S. 145, at p. 161, dissenting op. by Mr. Justice Frankfurter, concurred in by Mr. Justice Murphy and Mr. Justice Rutledge). To the same effect

is the last paragraph of the Court's opinion, per Mr. Justice Jackson in *Johnson* v. *United States, supra.*

14. Said views are obviously grounded upon the settled doctrine that a State's "criminal proceeding" must not "offend against basic canons of decency and fairness (*Herbert* v. *Louisiana,* 272 U. S. 312, 316); that where a constitutional guaranty is violated in the procurement of evidence, its admission is forbidden (*Olmstead* v. *United States,* 277 U. S. 438, 467), and that a conviction procured in disregard of liberties deemed fundamental by the Constitution "will not be permitted to stand" (*McNabb* v. *United States,* 318 U. S. at 339).

15. It would therefore appear that upon a direct consideration of the problem, this Court may hold that an unlawful search is a "type of coercion" comprised within the compass of due process, and that New York's doctrine admitting the fruits of an unlawful search on a par with an extorted confession, contravenes due process in unlawful search as well as coerced confession cases, because both are the product of coercive means; both with *illegality in the procurement* as the common ingredient.

CONCLUSION

The following authoritative observations are pertinent:

> "At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live."
>
> (Mr. Justice Murphy, dissenting in *Goldman* v. *United States,* 316 U. S. 129, 142.)

"To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purpose of despotic power, but those methods cannot abide the pure atmosphere of a free society."

Mr. Justice Murphy, dissenting in *Harris* v. *United States,* 331 U. S. 145, 192; Mr. Justice Frankfurter and Mr. Justice Rutledge concurring.)

In *Wolf* v. *Colorado,* referred to in paragraph 6, *ante,* certiorari was granted even though the Fourteenth Amendment was not invoked until the case reached the state appellate Court, and then only by supplemental assignment of error. Here the protection of that Amendment by its own force and in association with the Fourth Amendment, were specifically claimed from the very beginning of the prosecution.

A writ of certiorari should be granted.

Respectfully submitted,

Flushing, New York, March 19, 1949.

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APPENDIX

NEW YORK CODE OF CRIMINAL PROCEDURE, Secs. 177 and 178.

"Arrest by an officer without a warrant.

177. In what cases allowed. A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

"178. May break open a door or a window if admittance is refused.

To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

NEW YORK CODE OF CRIMINAL PROCEDURE, Sec. 986, so far as material, reads:

"Sec. 986. Pool-selling, book-making, bets and wagers, etcetera.

Any person who engages in pool-selling, or book-making with or without writing at any time or place, * * * and any person who records or registers bets or wagers or sells pools or makes book with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast * * * is guilty of a misdemeanor."

Note: Because of its omnibus provisions, the above Section 986 may be violated "in a number of ways" (*Peo.* v. *Corbalis*, 178 N. Y. 516, 521), said to be "15 ways" (*Peo.* v. *Peo. ex rel. Allen* v. *Hogan*, 170 N. Y. 46, 51). The quoted portion comprises the acts charged in the Indictment against petitioner.

New York State Constitution, Article 1, Sec. 12, so far as material, reads:

> "12. The right of the People to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

New York Civil Rights Law

> "8. Right of Search and Seizure. (Here follows language identical with the above Art. 1, Sec. 12.)"

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 675

EMETIA POLIZIO, alias Joe Pledge,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement.

Petitioner seeks a review of the judgment of the Court of Appeals of the State of New York, which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, which in turn affirmed a judgment of the County Court, Queens County, entered May 24, 1948, which convicted him, after trial by jury, of the crime of Bookmaking, a Misdemeanor, under Section 986 of the New York Penal Law (R. 165-167).

Question Presented.

Pledge contends that he was denied due process of law, guaranteed by the Fourteenth Amendment of the Federal Constitution, because of the use upon his trial in the State Court of evidence procured by a State Officer, allegedly by means of unreasonable search and seizure (Polizio's Petition, p. 5).

Facts Material to the Question Presented.

Petitioner was indicted, tried and convicted of the misdemeanor of Bookmaking for having received, accepted and recorded wagers on the outcome of horse races, which wagers were made over a telephone located in his home on the third floor of an apartment house, and were recorded by him on slips of paper (R. 3-5).

As appears in the record, on July 14, 1947, the State Police Officers, having obtained permission from the occupant of the apartment immediately above petitioner's (R. 109), used the fire escape and descended to the landing adjacent to the window of petitioner's premises. While peering through the venetian blinds, Officer O'Connor heard the telephone bell ring on three occasions, and, on each, observed the defendant answer the phone, move his lips as though talking, and then write upon pieces of paper which he placed upon a pile on his desk (R. 114-126). The officer was unable to hear what was being said during the phone conversations (R. 152); nor from his position could he see what was written on the slips (R. 226).

After the third such telephone call, the officer knocked on the window, exhibited his shield, and "told the defendant to open up, he was under arrest" (R. 127). Petitioner, however, immediately "proceeded to rip the telephone out of the wall", and the officer then "broke into the premises and placed the defendant under arrest" (R. 127).

Having effected admission for himself, the officer opened the apartment door to permit others to enter (R. 134).

On the desk, Officer O'Connor found 51 slips of paper, all of which bore records of wagers on horse races (R. 180, 181). Petitioner told O'Connor at that time that the slips represented all the bets he had received that day and that they were all made out in his, petitioner's, hand

(R. 183). Included with those slips were the three upon which the petitioner was observed to have written at the time of the telephone conversations (R. 184). Other paraphernalia used in the bookmaking enterprise were also found on the desk (R. 191, 192). In answer to the officer's inquiries petitioner stated that he had been receiving bets amounting to about $1,000.00 a day; had been operating at that location for about a week; that he had been making book for about twenty years; and that there was no cop who was going to stop him now (R. 208, 209).

The officers had no warrant for the petitioner's arrest or the search of his home, nor had any been issued (R. 169-172). It does appear, however, that the officer from his experience knew petitioner's actions to be those of a bookmaker and had observed him commit a crime (R. 150, 151, 158).

POINT I.

The Arrest Was Legal.

Under the New York Statute (*Code Crim. Pro., sec. 177*) the officer was authorized to make an arrest for the misdemeanor committed in his presence. By Section 178 of that Code he was permitted to break the outer window, admittance having been refused him after he had given notice of his office and his purpose.

It is the petitioner's claim that the arrest was illegal because no misdemeanor had been committed in the officer's presence and to his knowledge. The record negatives this contention, however. There can be no doubt but that the petitioner was actively engaged in the commission of the crime of bookmaking at the time of his arrest, and, in fact, this is conclusively established by his admissions to the police officer (R. 183, 208, 209).

In any event the officer testified that he observed the petitioner while engaged in conversing over the phone; that he saw the notations being made on the slips and that the only papers he seized were those which were in full view on the desk in petitioner's home. It was his testimony, also, that he knew that petitioner was engaged in the illicit enterprise of making book at the time and that he did observe the commission of that crime.

It is our earnest belief that under these circumstances the arrest was not only fully warranted but also proper and legal under the statutory provisions therefor. The mere seizure of the agencies by means of which petitioner carried out his criminal business was, therefore, an incident to the legal arrest, and as such forms the basis of no complaint (*Harris* v. *United States,* 331 U. S. 145).

POINT II.

The use, upon the State trial, of evidence seized by the State Officer did not abridge the petitioner's rights to due process under the Fourteenth Amendment.

As we understand the decisions of this honorable Court, petitioner, being prosecuted in a State Tribunal, was not entitled to the protection given by the Fourth Amendment unless the deprivation of those rights was tantamount to a denial of due process under the Fourteenth Amednment (*Harris* v. *United States,* 331 U. S. 145; 91 L. ed. 1013). We will, therefore, assume *arguendo* the illegality of the arrest, and address ourselves solely to the question "Did the admission into evidence of the documents seized by the State Officer amount to a denial of due process?"

The question is not entirely new. It was first presented to this Court in *Adams* v. *New York,* 192 U. S. 585. At that time the rights now asserted by the petitioner were em-

bodied, not in the State Constitution, but in Section 8 of the New York Civil Rights Law. This Court, however, held that the Fourth and Fifth Amendments of the Constitution contained no limitations upon the power of the States, and said

> "We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the 4th and 5th Amendments of the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the state."

The question was again considered by the State Court in *People* v. *Defore,* 242 N. Y. 13, in which case a petition for review by writ of certiorari to this Court was denied (270 U. S. 657).

In the year 1938 the People of the State of New York wrote the statutory provisions covering right of privacy into Article I, Section 12, of the State Constitution. The effect of this change was considered by the Court of Appeals of the State in *People* v. *Richters Jewelers,* 291 N. Y. 161, wherein it was determined that the rule of admissibility remain unaltered.

It is true that since the determination of the *Adams* case the rule to be applied in the Federal courts took an entirely different course. In that jurisdiction it has been held that the fruits of an illegal search and seizure are barred from use at the trial (*Weeks* v. *United States,* 232 U. S. 383; *Gouled* v. *United States,* 255 U. S. 298; *Harris* v. *United States,* 331 U. S. 145). Nevertheless, it was also determined that such evidence, if obtained by anyone not connected with the Federal Government, was still to be

received, and this upon the theory that the prohibition against unreasonable search and seizure affected only the Federal Government and its officers and agencies (*Olmstead* v. *United States*, 277 U. S. 438; *Burdeau* v. *McDowell*, 256 U. S. 465).

In advancing the claim that the admission of this evidence denied due process, petitioner contends that a close parallel exists to the rulings affecting coerced confessions. His theory is that since proof inherently illegal, because created by force, fear and duress, will not be received, by the same token good evidence already in existence will be barred if possession thereof is secured by an illegal search.

We believe that the fallacy of this claim lies in the fact that in the one case the rejected proof is not so much illegally obtained as it is illegally manufactured. It is this prohibitive means of creation which bars the proffered evidence from use. It is rejected because of its own inherent lack of dependability. To permit its use would render a trial a mere sham; it would reduce the judicial process to the level of the rack and the torture chamber. On the other hand, however, the evidence secured by unreasonable seizure, being already in existence but merely obtained improperly, bears no such taint.

Thus it is that although it has been said that both the coerced confession and the evidence obtained by illegal search and seizure are practises contrary to the principles of free government (*Malinski* v. *New York*, 324 U. S. 40; *Feldman* v. *United States*, 322 U. S. 487, dissent of Mr. Justice MURPHY), only the rule of exclusion is applied as to the coerced confession in all criminal prosecutions and in all jurisdictions. As to the evidence illegally seized, however, the bar is raised in the Federal courts only when the government itself prosecutes, and its own officers and agencies are guilty of the offending practises. And this is through the medium of the Fourth Amendment and not

the "due process" clause of the Fifth. As this Court stated in the *Feldman* case,

> "And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, supra; Gouled v. United States, 255 US 298, 65 L ed 647, 41 S Ct 261; Angello v. United States, 269 US 20, 70 L ed 145, 46 S Ct 4, 51 ALR 409, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. Burdeau v. McDowell, 256 US 465, 65 L ed 1048, 41 S Ct 574, 13 ALR 1159. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials. 'If knowledge of them (the facts) is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it.' Silverthorne Lumber Co. v. United States, 251 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426."

Surely, if it is proper in Federal courts to admit such proof so long as it is not obtained by the governmental agencies or officers, then there can be no assertion that the use of such evidence in State tribunals amounts to a denial of due process. Even were we to assume that such proof when received in a State court is tantamount to compulsory testimony, yet since it is free of the fear of hurt, torture or exhaustion, in rests within the province of the State to determine its own course and its procedural and evidentiary rules (*Adamson* v. *California,* 332 U. S. 46; *Twining* v. *New Jersey,* 211 U. S. 78; *Palko* v. *Connecticut,* 302 U. S. 319). The question being a matter which concerns policy only, the determination of the issues in accordance with the State rule affects none of the constitu-

tional safeguards afforded to the petitioner. As this Court has so ably stated in *Foster* v. *Illinois,* 332 U. S. 134, at 139, in applying the "due process" clause it

> "* * * is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived, not only before the Fourteenth Amendment, but for the 80 years since its adoption."

Conclusion.

In summary we respectfully submit that the record below indicates:

1. That petitioner was lawfully arrested by a police officer in whose presence the crime of bookmaking was committed;

2. That as an incident to such arrest the instrumentalities used by petitioner in committing the crime were lawfully seized;

3. That even though the documentary evidence was seized illegally, there was no deprivation of due process.

The petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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Appendix.

New York Code of Criminal Procedure, Secs. 177 and 178.

"Sec. 177. In what cases allowed.

A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

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"To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

New York Civil Rights Law.

"Sec. 8. Right of search and seizure.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York State Constitution, Article I, Section 12, so far as material reads:

"Sec. 12. (Security against unreasonable searches, seizures and interceptions)

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."